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00-1882

(3)

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

PHIL PARKER, Warden
Petitioner

vs.

DAVID LEROY SKAGGS
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR RESPONDENT TO PROCEED IN FORMA PAUPERIS

Respondent, David Leroy Skaggs, by counsel, requests leave to proceed *in forma pauperis*. Respondent has been represented by public defenders since his trial. The United States District Court for the Western District of Kentucky permitted Mr. Skaggs to proceed *in forma pauperis* by order entered January 19, 1996. The District Court appointed undersigned counsel to represent Respondent under 21 U.S.C. §848(q) by order entered on July 19, 1996.

34 pp

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion to Proceed In Forma Pauperis was served by first-class U.S. mail, postage prepaid, to A. B. Chandler III, Attorney General, and David A. Smith and Ian G. Sonego, Assistant Attorneys General, 1024 Capital Center Drive, Frankfort, Kentucky 40601-8204 on this 18th day of July 2001.

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Petitioner

vs.

DAVID LEROY SKAGGS
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
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RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Should this Court grant *certiorari* on the issue of whether the Sixth Amendment requires defense counsel to select an expert witness who is effective at trial, when the unanimous panel of the United States Court of Appeals did not hold that defense counsel were ineffective for selecting an incompetent witness, but rather held that Skaggs' trial counsel rendered ineffective assistance when they failed to investigate and present meaningful mitigating evidence and when they decided to present the testimony of a fake psychologist at the penalty phase retrial despite having concluded that his testimony at the trial three months prior was "awful," "[h]e was incoherent," he "didn't make sense," "[p]eople in the audience were laughing at him," and trial counsel had "decided we would be in better shape not calling him than if we called him." Skaggs v. Parker, 235 F.3d 261, 267, 269 (6th Cir. 2000).

2. Should this Court grant *certiorari* on the issue of whether the Sixth Amendment guarantees a defendant the effective assistance of an expert witness, when the unanimous panel of the United States Court of Appeals specifically stated that it was not holding that Skaggs was entitled to a competent defense expert, but was basing its decision on the ineffective assistance of counsel during the sentencing phase. Id., 235 F.3d at 273.

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STATEMENT OF THE CASE

David Skaggs is mentally retarded. Petitioner concedes that as early as elementary school, David received an IQ score of 64 on intelligence testing. See Petitioner's Petition for Writ of Certiorari, p. 23. Intelligence testing conducted after his trial confirmed the earlier diagnosis of mental retardation. Transcript of the state court record (hereinafter TR), XIII, 54-59. In Kentucky, evidence of mental retardation is considered to be so significant, that the Kentucky death penalty statute mandates that juries be instructed to consider evidence of mental retardation as mitigating evidence. Ky. Rev. Stat. Ann. § 532.025(2)(b)(7). The importance Kentucky law places upon the mitigating aspect of mental retardation is further evidenced by the fact that the Kentucky Legislature has determined, since David's trial, that mentally retarded offenders are not even eligible for the death penalty. Ky. Rev. Stat. Ann. § 532.140. That statute, however, was made prospective to cases where the trial was commenced after the effective date of the statute. Despite the unquestionably mitigating nature of David Skaggs' mental retardation, the jury that sentenced David to death was never informed that he is mentally retarded.

David Skaggs suffers from more than simple mental retardation. He has other mental problems that were not discovered by his trial attorneys, and were never presented to the jury that sentenced him to death. Dr. Eric S. Engum, a

clinical psychologist who examined David after his trial, found that, "the results of neuropsychological assessment clearly indicated that Mr. Skaggs suffers from significant compromise in almost all areas of cognitive function." TR XIII, 69. Respondent's scores on relevant tests "placed him at least in the mildly if not in the moderately impaired range with regard to brain behavior relationships." TR XIII, 69. "In fact, considering the four most sensitive indicators of brain dysfunction in terms of level of performance ... Mr. Skaggs' scores were clearly in the brain damaged range in each instance." TR XIII, 69-70 (emphasis added). The "results of comprehensive neuropsychological assessment clearly reflect a patterning of results consistent with some form of underlying organic brain syndrome." TR XIII, 70 (emphasis added). Personality tests results "reflect an individual who may be in a borderline psychotic condition with severe disturbances of thought, mood, and behavior." TR XIII, 73. Also found were "strong paranoid features which suggest that respondent has lived under the fear of attack and humiliation." TR XIII, 74. Engum posited that the basis for much of this symptomology might find its genesis in "a strong sense of parental indifference or rejection. Individuals obtaining similar [psychological] profiles are likely to have experienced early hate, anger, disgust, or rejection from the person upon whom their survival depended." Id. According to Dr. Engum's report, it appears that this resulted in "a shutting down during some development tasks," and that "important learning experiences

were not experienced because of this shutting down which resulted in deficit coping skills." Id. According to Dr. Engum, "It does appear that schizophrenia thought patterns emerged due to the resultant shut down of normal thought patterns." Id.

The Fake Psychologist

Prior to David Skaggs' trial, his court-appointed attorneys requested the assistance of a psychologist to perform an evaluation of David. There was some difficulty in locating a psychologist, due in part to time constraints placed by the trial court. Eventually, however, an individual by the name of Elya Bresler was located and appointed by the trial court to perform an evaluation of David. TR III, 427. Unbeknownst to anyone at the time, Bresler was not a psychologist, he had no academic degrees or training as a psychologist, and his post-secondary education consisted of two years of college as an English major. TR X, 1254-1285. Bresler was a complete fake, and was later prosecuted and convicted by the Commonwealth of Kentucky for the offenses of Theft by Deception and Perjury as a result of his testimony and acceptance of a fee in a criminal case, unrelated to the case at bar. Commonwealth v. Bresler, Jefferson Circuit Court Indictment No. 84-CR-0987.

Needless to say, Bresler did not discover David Skaggs was mentally retarded, or that David has the other mental problems listed above, during his

pretend evaluation of Skaggs. With respect to Bresler's purported evaluation, Dr. Eric Engum stated:

> Mr. Bresler determined that Mr. Skaggs was performing within the average range of intellectual functioning, a finding that is definitely belied by his most recent intelligence testing. Mr. Bresler was also completely negligent and totally incompetent in terms of evaluating Mr. Skaggs' overall neuropsychological status. ... Hence, with regard to the most significant issues; namely, intelligence, the presence or absence of indicia of organic brain damage, and the presence or absence of a major psychosis (schizophrenia, affective disorder, or organic brain syndrome with psychosis), Mr. Bresler's findings were erroneous, improper, not supported by the data, and arguably misrepresentative of the client.
>
> * * * * * * *
>
> By ineffectively evaluating the client, by arriving at clearly erroneous diagnostic impressions, by positing criminal insanity when none existed, by failing to identify Mr. Skaggs' low borderline intellectual functioning, by failing to identify Mr. Skaggs' neuropsychological deficits, and by producing a report which contained what may be charitably termed psychobabble (e.g., "he is oriented generally to time and place except in pronounced episodic and chronic aphasiac or fugal instances"), It is this examiner's opinion that Mr. Skaggs' psychological status was misrepresented and that salient and important features were omitted from the jury's purview.

TR XIII, 77-78.

The Trial and Penalty Phase Retrial

David Skaggs' trial attorneys called Bresler as a witness during the guilt phase of his trial. Bresler's testimony was laced with bizarre references to auto mechanics and auto electricians, canes that are perceived to be elephants, chocolate ice cream, Frenchmen who get furious if called a camel, ostriches, mosquitoes, spiders, bulls, trees, Einstein's use of Fels-Naptha soap, and James Watt, and was soundly ridiculed by the prosecutor. Testimony of Elya Bresler at Transcript of Evidence (hereinafter TE) IX, 1207-1291. During the evidentiary hearing in the United States District Court, respondent's trial counsel described Bresler's testimony as follows:

> [H]e was awful. He was incoherent. He was talking about things that didn't make sense. You couldn't stop him. You couldn't reel him back in. People in the audience were laughing at him.
>
> So Joe and I talked afterwards. Our initial intent had been to recall him at the penalty phase. We discussed it and decided we would be in better shape not calling him than we would be if we called him. So we did not recall him at the [first] penalty phase.

Testimony of Donna Boyce at Transcript of Evidentiary Hearing (hereinafter TEH), 8.

Respondent's other trial counsel, Joe Kirwan, had the following recollection of Bresler's testimony during the first trial:

> I remember Mr. Bresler making the statement during his testimony about David's psychosis or whatever; and he used his cane as an example and said that if David believed the cane was an elephant, it would be an elephant. And I remember sitting at counsel table, and I had a hard -- maybe I wasn't smart enough to appreciate the -- what he was trying to say, but I don't think the jury probably believed that testimony.
>
> So did I think he was effective? Obviously not. I don't think he was.

Testimony of Joe Kirwan at TEH, 25-26.

The jury returned a guilty verdict on every charged offense. The case then proceeded to a penalty phase. The jury set the penalty for every non-capital offense, but was unable to agree upon a sentence for the two counts of capital murder. The jury was then discharged by the trial court.

A retrial of the penalty phase commenced approximately three months later. The prosecution was allowed to present essentially the same evidence it had presented during the guilt phase of the first trial. During the cross-examination of Bresler the prosecutor pressed him on the ludicrous nature of his testimony at the first trial:

> Q. The last time we talked, I was interested in that a number of famous people you thought were psychotic, great -- great people like Einstein.
>
> A. I never said that Einstein was psychotic.
>
> Q. You remember what you told me about that?

A. I said he had some eccentricities. I said he had some eccentricities. First of all, I would never say anyone was psychotic, unless I had examined them. I do not make value judgments.

Q. You, obviously hadn't had an opportunity to examine Dr. Einstein?

A. I knew Einstein personally, but I never examined him, and he had some eccentricities.

Q. And I believe the Secretary of the Interior, you said, similarly, Mr. Watts?

A. I said – again, I have never met Mr. Watts or examined him. I said he is showing certain tendencies.

Testimony of Elya I. Bresler, TE XVII, 2385-2386

The Unanimous Panel's Opinion

The panel of the United States Court of Appeals for the Sixth Circuit discussed only one of the issues raised by respondent in the appeal of his habeas corpus petition in any detail, whether he received ineffective assistance of counsel in violation of his Sixth Amendment rights. The court divided that claim into two distinct aspects, ineffective assistance of counsel during the guilt phase of trial, and ineffective assistance of counsel during the retrial of the penalty phase of the trial. The court applied the familiar legal standard set forth in Strickland v. Washington, 466 U.S. 668 (1984) to the claims.

With regard to the guilt phase, the court held that respondent had failed to show that his counsel were ineffective, given the Strickland standard's strong

presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Skaggs v. Parker, supra, 235 F.3d at 268. Although the court noted that "[g]iven the magnitude of what was at stake, and the centrality of Skaggs' mental state to a legitimate defense, counsel should have taken more time and given more thought to their expert witness," it nevertheless held that the method counsel used to select Bresler as their expert witness "did not fall below an objective standard of reasonableness under Strickland." Id.

With regard to the retrial of the penalty phase, however, the court held that respondent did show that he had received ineffective assistance of counsel. The court based its decision, in large part, on counsel's failure to make any attempt to obtain the services of a competent expert during the time before the retrial, after having concluded that they "would be in better shape not calling [Bresler] than we would be if we called him," Testimony of Donna Boyce, TEH, 8, thereby foregoing the opportunity to introduce other competent mitigating evidence, and the lack of a legitimate reason for that failure:

> Counsel's decision to call Bresler at the retrial of penalty phase, despite their belief that Bresler's testimony could realistically be more harmful than helpful, simply because counsel believed it would not be worth their time to request additional money from the court, cannot be deemed to have been a reasonable exercise of professional judgment. Because defense counsel failed to introduce other competent mitigating evidence, they essentially failed to put on any mitigating evidence at all. Thus, we hold that counsel's decision to present Bresler's

> testimony as crucial mitigating evidence at the penalty phase of the trial, having had the advantage of witnessing Bresler's previous bizarre performance and, more importantly, counsel's complete failure to present other mitigating evidence on Skaggs' behalf, fell below an objective standard of reasonableness.

Skaggs v. Parker, supra, 235 F.3d at 270.

The court then addressed the prejudice prong of the Strickland inquiry, whether there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. In determining that respondent had been prejudiced by his counsel's deficient performance, the court looked at the evidence respondent presented to the Kentucky courts during his post-conviction proceedings, evidence of his mental retardation and other serious mental problems, and held that given "the considerable mitigation evidence that could have been presented by an actual expert had counsel functioned properly, we find that 'counsel's deficient performance render[ed] the result of the trial unreliable [and] the proceeding fundamentally unfair.'" Id., 235 F.3d at 275.

Accordingly, the court reversed the decision of the district court, and remanded the case to that court with instructions that it issue a writ of habeas corpus vacating respondent's death sentences. Id.

The Denial of Rehearing En Banc

Following the rendition of the unanimous panel's opinion, Warden Parker, petitioner herein, petitioned the entire United States Court of Appeals for the Sixth

Circuit for a rehearing en banc. That petition was circulated to all of the members of the original panel and to every active judge of the Sixth Circuit who was not on the original panel. The petition for rehearing en banc did not receive a single vote from the judges of the United States Court of Appeals for the Sixth Circuit. Order entered March 16, 2001, Appendix to Petition for Writ of Certiorari, p. 65-66. Having failed to receive a single vote from the judges of the Sixth Circuit, petitioner petitioned this Court for a writ of certiorari.

REASONS FOR DENYING THE WRIT

I.

THE HOLDING OF THE UNANIMOUS PANEL OF THE SIXTH CIRCUIT IS BASED UPON THE FAMILIAR STANDARD BY WHICH INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS ARE REVIEWED, SET FORTH IN STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984), AS APPLIED TO THE FACTS OF THIS CASE. THIS IS NOT A CASE MERITING CERTIORARI REVIEW.

The holding of the Court of Appeals was not grounded in the basis that petitioner urges this Court to review. Petitioner asks this Court "to decide whether the alleged incorrectness of an expert's conclusions, without more, may be imputed to counsel for purposes of Sixth Amendment analysis." Petition for Writ of Certiorari, 10. That obviously was not the basis for the Court of Appeals' decision. If it had been, the Court of Appeals would have reversed with respect to the guilt

phase as well as the penalty phase, because Bresler's conclusions were just as incorrect in the guilt phase of David Skaggs' trial as they were in the penalty phase of David's trial. Since the Court of Appeals only reversed the sentences imposed at the retrial of the penalty phase, its decision could not have been based on the "incorrectness of an expert's conclusions, without more," as petitioner claims.

The feebleness of petitioner's argument for certiorari review is betrayed by the way in which petitioner feels compelled to unfairly distort the Court of Appeals' decision. Not only does petitioner misstate the basis of the court's decision, but it follows this misstatement of the facts with an even more outrageously misleading claim, that the unanimous Court of Appeals applied a "res ipsa loquitur theory of counsel ineffectiveness." Counsel for petitioner must not have read the Court of Appeals decision. If they had, they would have seen that the Court of Appeals reversed the district court, not because David Skaggs' trial attorneys selected a fake psychologist or simply because that fake psychologist testified to conclusions that were not believable, but that they did so while failing to uncover compelling, truthful mitigating evidence. Any fair reading of the Court of Appeals decision shows that court meticulously applied the standard of ineffective assistance of counsel enunciated in Strickland v. Washington, supra. The court based its opinion that trial counsel were ineffective on "counsel's very significant errors at the penalty phase of trial -- particularly the failure to

investigate and present meaningful mitigating evidence, and their decision to use an incompetent and fraudulent 'psychologist' as the central mitigation witness." Skaggs v. Parker, 235 F.3d 261, 267 (6th Cir. 2000) (emphasis added). The court held that trial counsel's deficient performance prejudiced Skaggs, "such that our confidence in the outcome of the penalty phase of Skaggs' trial has been nullified." Id.

The court accurately stated and properly applied the appropriate legal standard for ineffective assistance claims. First, the court examined counsel's performance based upon an "objective standard of reasonableness." Id., 235 F.3d at 268. The court specifically stated that the Strickland standard is "a highly deferential standard," including "'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" Id. The Court then explained in detail why trial counsels' decision to recall Bresler at the penalty phase retrial, after having concluded following the first trial that his testimony was detrimental to Skaggs' case, and thereby foregoing an investigation that would have disclosed Skaggs' mental retardation and other mental problems that the imposter Bresler was too incompetent to discover, was objectively unreasonable under the Strickland standard. Id., 235 F.3d 269-270.

The Court then applied the correct standard to determine whether Skaggs had been prejudiced by his trial counsel's deficient performance:

> To establish the prejudice prong of an ineffective assistance claim, Skaggs "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Skaggs v. Parker, supra, 235 F.3d at 270-271. Ultimately, the Court concluded that he had met the appropriate standard of prejudice.

Contrary to petitioner's allegation, the unanimous panel of the Court of Appeals specifically held that they were not reversing the case based upon the fact that Bresler was incompetent. That court stated:

> The case before us is not one of a mere disagreement between experts, or a case in which the expert for [David Skaggs] did not testify as favorably as [David Skaggs] had hoped – both circumstances in which the granting of a habeas petition would be inappropriate. Nor do we rely on the suggestion from Ake, not explicitly adopted by this Court, that [David Skaggs] is entitled to a competent expert in his defense. ... In this case, there is no need to go so far as to hold that Skaggs was entitled to a competent defense expert because, here, the prejudice to Skaggs resulted from his own counsel's failure to assert effectively his rights at sentencing.

Skaggs v. Parker, supra, 235 F.3d at 272-273. Petitioner's claim that "[t]he Sixth Circuit considered this perceived requirement of witness effectiveness to be a necessary component of counsel effectiveness analysis under the circumstances presented here," Petition for Writ of Certiorari, 11, is patently false. The unanimous panel's decision was clearly based upon trial counsels' ineffectiveness,

not upon Bresler's incompetence. The only references to the entitlement to a competent expert were matters of dicta. Furthermore, were it otherwise, the unanimous panel would have been compelled to reverse the district court's denial of the writ for the guilt phase as well as the penalty phase, because Bresler also testified at the guilt phase of the trial. As both trial counsel's testimony and the panel's opinion indicate, Bresler was no more competent as an expert witness during the guilt phase of the trial than he was during the retrial of the penalty phase.

This Court should reject the invitation to decide whether Ake's requirement of expert assistance entitles a defendant to competent expert assistance because that issue was never decided by the court below. The unanimous panel's decision was very clearly based upon the denial of respondent's right to the effective assistance of counsel during the retrial of the penalty phase, and carefully applied the Strickland v. Washington standard to the facts of this case. The Petition for Writ of Certiorari should be denied.

II.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE COURT BELOW NEVER HELD THAT THE SIXTH AMENDMENT REQUIRES COUNSEL TO SELECT AN EXPERT WHOSE PERFORMANCE IS EFFECTIVE AT TRIAL.

Once again petitioner tries to create a sham issue by unfairly distorting the decision of the Court of Appeals[1]. Although the Court of Appeals may have recognized that there was a split of authority as to whether Ake v. Oklahoma, 470 U.S. 68 (1985) entitles a defendant to the services of a competent expert, the Court of Appeals very specifically said that they were not basing their decision on the right to a competent expert. The court said:

> Nor do we rely on the suggestion from Ake, not explicitly adopted by this Court, that [David Skaggs] is entitled to a competent expert in his defense. ... In this case, there is no need to go so far as to hold that Skaggs was entitled to a competent defense expert because, here, the prejudice to Skaggs resulted from his own counsel's failure to assert effectively his rights at sentencing.

Skaggs v. Parker, supra, 235 F.3d at 272-273.

Moreover, the Court of Appeals very plainly could not have held that David Skaggs trial counsel were ineffective for selecting a fraudulent psychological expert, because such a holding would have entailed a reversal of the guilt phase of

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[1] Indicative of petitioner's outright misrepresentation of the truth is the final sentence of the first paragraph of page 17 of the Petition for Writ of Certiorari. In that sentence, petitioner misrepresents the holding of the Court of Appeals by juxtaposing two short quotes in a single sentence. Petitioner says, "Citing Strickland, the Skaggs panel concluded that because 'Bresler was not a competent witness,' his performance and therefore counsel's performance 'fell below an objective standard of reasonableness.'" In fact, the two phrases quoted by petitioner are separated by two complete sentences and one hundred sixty-nine words of text. The two quoted phrases are taken completely out of context. A reading of the complete paragraph from which these two phrases are lifted shows that the Court of Appeals did not say what petitioner claims it said. Skaggs v. Parker, supra, 235 F.3d at 270. The failure of petitioner's counsel to accurately state the Court of Appeals' holding is a factor that should militate against the granting of certiorari review. Sup. Ct. R. 14(4).

the trial as well as the retrial of penalty phase. Bresler testified at the guilt phase of David Skaggs' trial, and he was just as incompetent a witness at the guilt phase of the trial as he was at the retrial of the penalty phase. By not reversing the guilt phase of David Skaggs' trial, the Court of Appeals evidenced that their decision was not based upon the mere selection of an incompetent expert witness.

The additional factor that made David Skaggs' counsel ineffective was their observations concerning Bresler during the guilt phase of the trial, and the unreasonableness of their decision not to seek funds to hire a competent expert prior to the retrial of the penalty phase. Attorney Boyce made these observations about Bresler's testimony during the guilt phase of trial:

> [H]e was awful. He was incoherent. He was talking about things that didn't make sense. You couldn't stop him. You couldn't reel him back in. People in the audience were laughing at him.
>
> So Joe and I talked afterwards. Our initial intent had been to recall him at the penalty phase. We discussed it and decided we would be in better shape not calling him than we would be if we called him. So we did not recall him at the [first] penalty phase.

Testimony of Donna Boyce at TEH, 8. Attorney Kirwan was not as detailed in his recollection of what transpired, but he had a distinct recollection of a portion of Bresler's testimony that he did not consider believable, and he expressed doubts about whether the jury believed Bresler. Testimony of Joe Kirwan at TEH, 25-26. Despite their conclusion that David Skaggs would be better off if Bresler was not

even called as a witness, trial counsel took no action to obtain funds to hire a different psychological expert during the approximately three and one half months between the conclusion of the first trial and the beginning of the retrial of the penalty phase. The unanimous Court of Appeals said:

> Counsel's decision to call Bresler at the retrial of the penalty phase, despite their belief that Bresler's testimony could realistically be more harmful than helpful, simply because counsel believed it would not be worth their time to request additional money from the court, cannot be deemed to have been a reasonable exercise of professional judgment.

Skaggs v. Commonwealth, supra, 235 F.3d at 270.

Whether there is a split of authority concerning a constitutional requirement that the expert assistance guaranteed by Ake v. Oklahoma, supra, be "competent" expert assistance is irrelevant. That issue was specifically left undecided by the Court of Appeals. The issue upon which petitioner seeks to have this Court grant certiorari review is, therefore, not properly before the Court. Accordingly, the Petition for Writ of Certiorari should be denied.

III.

THE DECISION BELOW WAS NOT BASED ON AKE V. OKLAHOMA, 470 U.S. 68 (1985), NOR DOES IT CONFLICT WITH EITHER AKE OR STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984).

Finally, petitioner presents a laundry list of abuses it claims the Court of Appeals committed in reaching a decision adverse to petitioner. It should be noted that, not only was the panel of judges that decided this case unanimous, but most of the complaints in this laundry list were presented to every active judge of the United States Court of Appeals for the Sixth Circuit in the petition for rehearing en banc, and not a single member of that court voted to rehear this case en banc. See, Order Entered March 16, 2001, Appendix to Petition for Writ of Certiorari, 65-66. Furthermore, most, if not all, of the issues in this laundry list are not "fairly included" within the question petitioner claimed he was presenting to this Court, and, consequently, should not be considered by the Court. Sup. Ct. R. 14(1)(a).

Contrary to petitioner's claim, there was no admonishment in Ake v. Oklahoma, supra, against joining a battle of experts on post-conviction review. Regardless, the decision below was not based upon Ake, so the point petitioner is attempting to make is irrelevant to the case at bar. Contrary to petitioner's inference, the panel's decision recognized that the Strickland, supra, standard "includes a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" Skaggs v. Parker, supra, 235 F.3d at 268.

Contrary to petitioner's argument, Strickland, supra, does not require a presumption that testimony by trial defense counsel during a post-conviction evidentiary hearing be totally discounted. There was no finding by the United

States District Court, either explicit or implicit, that there was any question about the honesty and integrity of David Skaggs' trial counsel such that their testimony could not be believed.

The first trial ended in a mistrial of the penalty phase on March 5, 1982, not March 12, 1982, as petitioner alleges. TR VII, 979. The retrial of the penalty phase began on June 22, 1982, not June 23, 1982, as petitioner alleges. TR IX, 1186. The Court of Appeals correctly found that the approximately three and one half months between the mistrial and the retrial of the penalty phase was more than enough time for respondent's trial counsel to obtain the services of a competent expert. Furthermore, if three and a half months was not sufficient time, Skaggs' trial counsel had a duty to request a reasonable continuance rather than proceed to trial with a witness they believed they "would be in better shape not calling." Testimony of Donna Boyce at TEH, 8.

1.

Bresler Was A Complete Fraud. Moreover, The Decision Of The Court Of Appeals Was Not Based Upon Bresler's Lack Of Credentials.

This issue is not "fairly included" within the question petitioner claimed he was presenting to this Court, and, consequently, should not be considered by the Court. Sup. Ct. R. 14(1)(a).

The claim that Bresler was an expert is ludicrous. The Commonwealth of Kentucky prosecuted Bresler for Theft by Deception, a felony, because he collected a fee as an expert witness in an unrelated criminal prosecution. Commonwealth v. Bresler, Jefferson Circuit Court Indictment No. 84-CR-0987. Bresler was also convicted of perjury in that case. Respondent should now be estopped from arguing that Bresler was an expert after prosecuting him for perjury and theft because he claimed he was an expert. Furthermore, the fact that Bresler failed to uncover David Skaggs' mental retardation, which was first diagnosed with intelligence testing when David Skaggs was in elementary school and confirmed by intelligence testing performed after the trial of this case, demonstrates that Bresler could not competently perform the intelligence tests he claimed to have performed.

While it may be true that under Kentucky law a lay witness may give an opinion as to the sanity of the accused after laying an evidentiary foundation that the witness had the opportunity to observe and form an opinion as to the sanity of the accused, Brown v. Commonwealth, 934 S.W.2d 242, 248 (Ky. 1996), it has never been held under Kentucky law that, once a judicial determination has been made that the defendant is entitled to the services of an expert in psychology, that the defendant's right to expert assistance is satisfied by the provision of a lay person. Regardless, the Court of Appeals decision was not based upon Bresler's

lack of qualifications, but upon trial counsel's ineffectiveness during the retrial of the penalty phase of the trial. Petitioner's argument does not address the issue decided by the Court of Appeals.

2.

Bresler's Conclusions And Testimony Were Misrepresentative Of David Skaggs' Mental Condition. The Jury That Sentenced David To Death Was Never Told About Undeniably Mitigating Evidence.

This issue is not "fairly included" within the question petitioner claimed he was presenting to this Court, and, consequently, should not be considered by the Court. Sup. Ct. R. 14(1)(a).

Regarding Bresler's conclusions, Dr. Engum stated:

> Mr. Bresler determined that Mr. Skaggs was performing within the average range of intellectual functioning, a finding that is definitely belied by his most recent intelligence testing. Mr. Bresler was also completely negligent and totally incompetent in terms of evaluating Mr. Skaggs' overall neuropsychological status. ... Hence, with regard to the most significant issues; namely, intelligence, the presence or absence of indicia of organic brain damage, and the presence or absence of a major psychosis (schizophrenia, affective disorder, or organic brain syndrome with psychosis), Mr. Bresler's findings were erroneous, improper, not supported by the data, and arguably misrepresentative of the client.
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> By ineffectively evaluating the client, by arriving at clearly erroneous diagnostic impressions, by positing

> criminal insanity when none existed, by failing to identify Mr. Skaggs' low borderline intellectual functioning, by failing to identify Mr. Skaggs' neuropsychological deficits, and by producing a report which contained what may be charitably termed psychobabble (e.g., "he is oriented generally to time and place except in pronounced episodic and chronic aphasiac or fugal instances"), it is this examiner's opinion that Mr. Skaggs' psychological status was misrepresented and that salient and important features were omitted from the jury's purview.

TR XIII, 77-78. Bresler obviously lied about more than his credentials. At a minimum, he lied about performing intelligence testing, he lied about performing neurological testing, and he lied about performing psychological testing. At the retrial of the penalty phase, he claimed to have been a personal acquaintance of Albert Einstein, which, to say the least, is very difficult to believe. TE XVII, 2385. Regardless, the Court of Appeals' decision was not based upon the fact that Bresler lied, it was based upon trial counsel's ineffective assistance during the retrial of the penalty phase. Once again, petitioner does not address the issue decided by the Court of Appeals.

3.

Trial Counsel's Decision To Recall Bresler During The Retrial Of The Penalty Phase Was Not A Reasonable Exercise Of Professional Judgment.

This issue is not "fairly included" within the question petitioner claimed he was presenting to this Court, and, consequently, should not be considered by the Court. Sup. Ct. R. 14(1)(a).

By the conclusion of the guilt phase of the first trial, both of David Skaggs' trial counsel knew there was something seriously wrong about Bresler. Donna Boyce testified that he was awful and they had discussed the situation and believed they would be better off if they did not call Bresler as a witness during the penalty phase. Testimony of Donna Boyce at TEH, 8. Joe Kirwan testified concerning a portion of Bresler's testimony. It was Kirwan's impression that the jury did not believe Bresler's "folksy metaphor" about a cane being an elephant. Testimony of Joe Kirwan at TEH, 25-26. The unanimous Court of Appeals concluded that, "Counsel's decision to call Bresler at the retrial of the penalty phase, despite their belief that Bresler's testimony could realistically be more harmful than helpful, simply because counsel believed it would not be worth their time to request additional money from the court, cannot be deemed to have been a reasonable exercise of professional judgment." Skaggs v. Parker, supra, 235 F.3d at 270. Petitioner fails to recognize that neither of the juries that heard Bresler believed him. If they had, the guilt phase jury would have acquitted David Skaggs, and the penalty phase retrial jury would have certainly imposed a sentence less than death.

4.

The Court Of Appeals Correctly Considered The Question Of Prejudice, As Part Of Its Strickland v. Washington, Supra, Analysis, De Novo In This Pre-AEDPA Case.

This issue is not "fairly included" within the question petitioner claimed he was presenting to this Court, and, consequently, should not be considered by the Court. Sup. Ct. R. 14(1)(a).

David Skaggs filed his federal habeas petition in January 1996, before the enactment of the Antiterrorism and Effective Death Penalty Act (hereinafter, AEDPA). Therefore, the pre-AEDPA habeas law applies to this case. Under pre-AEDPA habeas law, mixed questions of law and fact are to be reviewed de novo by federal courts. Miller v. Fenton, 474 U.S. 104, 112 (1985). The Court of Appeals analyzed the prejudice resulting from trial counsel's ineffective assistance as part of its Strickland v. Washington, supra, inquiry. In Strickland, supra, 466 U.S. at 698, this Court said that, "both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." Therefore, in this pre-AEDPA case, the Court of Appeals correctly considered the prejudice component of the Strickland inquiry de novo.

Respondent inaccurately states that Dr. Engum found that David Skaggs had an IQ of 81. The 81 number in Dr. Engum's report refers to a score David received on the Negative Relationships scale of the Personality Assessment

Inventory, a personality test. TR XIII, 75. It has nothing to do with David Skaggs' IQ.

Petitioner fails to inform the Court that the conclusions of the prosecution expert, Pran Ravani, would have been seriously undermined if David Skaggs' trial attorneys had consulted with a competent expert. A competent expert would have alerted respondent's counsel to the fact that Ravani had not conducted any intelligence testing of David before reaching the erroneous conclusion that David was not mentally retarded. The only testing conducted by Ravani or his support staff at the Kentucky Correctional Psychiatric Center was a Minnesota Multiphasic Personality Inventory, a personality test. His conclusion regarding David's intelligence, therefore, had no scientific basis.

5.

The Unanimous Panel Of The Court Of Appeals Found That The Decision To Call Bresler At The Retrial Of The Penalty Phase, Because Counsel Did Not Think It Would Be Worth Their Time To Ask For Additional Funds From The Court, Could Not Be Deemed To Have Been A Reasonable Exercise Of Professional Judgment.

This issue is, at best, only tangentially related to the question petitioner claimed he was presenting to this Court. Respondent would argue that it is not "fairly included" within the question, and should not be considered by the Court. Sup. Ct. R. 14(1)(a).

The decision of the Court of Appeals did not hold that David Skaggs' trial counsel were constitutionally ineffective in their cross-examination of Pran Ravani. Although, as was seen in the previous section, if respondent's counsel had obtained the services of a competent expert, that expert would have assisted them in performing a more effective cross-examination of Ravani. Rather, the Court of Appeals held that:

> [C]ounsel's decision to present Bresler's testimony as crucial mitigating evidence at the penalty phase of the trial, having had the advantage of witnessing Bresler's previous bizarre performance and, more importantly, counsel's complete failure to present other mitigating evidence on Skaggs' behalf, fell below an objective standard of reasonableness.

Skaggs v. Parker, supra, 235 F.3d at 270. Petitioner fails to address the issue decided by the Court of Appeals.

6.

The Unanimous Panel Of The Court Of Appeals Correctly Applied Pre-AEDPA Habeas Law.

This issue is not "fairly included" within the question petitioner claimed he was presenting to this Court, and, consequently, should not be considered by the Court. Sup. Ct. R. 14(1)(a).

Petitioner has failed to cite even one instance where the Court of Appeals failed to apply a presumption of correctness to a state court finding of historical fact. Petitioner makes a vague accusation with absolutely nothing to back it up.

State court determinations concerning federal law and mixed questions of law and fact are not entitled to a presumption of correctness under pre-AEDPA habeas law. Those issues are reviewed de novo. Miller v. Fenton, supra. The correctness of the unanimous panel's decision is supported by the fact that petitioner's Petition for Rehearing En Banc was circulated to every active judge of the United States Court of Appeals for the Sixth Circuit, and no judge of that court requested a vote on the suggestion for rehearing en banc.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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